Overnite Transportation Company *and* Truck Drivers, Oil Drivers, Filling Station and Platform Workers Union, Local No. 705, an affiliate of the International Brotherhood of Teamsters, AFL–CIO.[1] Cases 13–CA–29357 and 13–CA–29749

May 22, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On September 13, 1991, Administrative Law Judge Hubert E. Lott issued the attached decision. The Union filed exceptions and a supporting brief and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] The name of the Charging Party has been changed to reflect the new official name of the International Union.

[2] The Union has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We are also satisfied that the Union's contention that the judge was biased is without merit. Careful review of the record and the judge's decision shows no statements or other evidence indicating bias, or partiality to the Respondent's case, on the part of the judge.

We note that at sec. II,B, par. 5, of the judge's decision, the third sentence should in relevant part state, ''when the Union was voted in and questioned why McBride . . . .'' At sec. III,C, par. 85, the fifth sentence should state in relevant part, ''Section 8(d) . . . .'' Finally, at sec. III,C, par. 93, the correct citation is *Eltec Corp*., 286 NLRB 890 (1987).

In adopting the judge's decision, we have taken administrative notice of our recently issued decision in *Overnite Transportation Co*., 306 NLRB 237 (1992), but conclude that none of the findings there militate against our agreement with the judge that in this proceeding the Respondent did not violate Sec. 8(a)(5).

Richard Kelliher-Paz, Esq., for the General Counsel.
W.T. Cranfell Jr. and *Michael V. Matthews, Esqs. (Blakeney, Alexander & Machen)*, of Charlotte, North Carolina, for the Respondent.
Sheldon Cherone, Esq. (Carmel, Cherone, Widmer, Matthews & Moss), of Chicago, Illinois, for the Charging Party.

DECISION

STATEMENT OF THE CASE

HUBERT E. LOTT, Administrative Law Judge. This case was heard at Chicago, Illinois, on March 25 and 26, 1991, on unfair labor practice charges and amended charges filed from March 21 to October 10, 1990, against Overnite Transportation Company (Respondent) by Teamsters Local No. 705 (Union) alleging violations of Section 8(a)(1) and (5) of the Act. The last complaint issued November 30, 1990.

The issues in the case are whether or not Respondent committed certain independent 8(a)(1) violations and whether or not Respondent violated Section 8(a)(1) and (5) of the Act by refusing to agree to a dues-checkoff provision, union-security clause, union's health and welfare package, and binding arbitration involving discipline, safety, and claims over $1000. Respondent is also alleged to have violated Section 8(a)(5) of the Act by refusing to post a union notice on a company bulletin board after orally agreeing to allow such postings.

Respondent's answer to the complaint, duly filed, denies the commission of any unfair labor practices.

The parties were afforded an opportunity to be heard, to call, to examine and cross-examine witnesses, and to introduce relevant evidence. Since the close of hearing, briefs have been received from the parties.

On the entire record and based on my observation of the demeanor of the witnesses, and in consideration of the briefs submitted, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Company is a corporation with a place of business located in Chicago, Illinois, where it is engaged in the transportation of freight and commodities. During the past calendar year, the Company, in the course and conduct of its business operations, derived gross revenues in excess of $50,000 for the transportation of freight and commodities from the State of Illinois directly to points outside that State.

Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent further admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Respondent operates a terminal located at Bedford Park, Illinois. In 1982, the Union was certified to represent a unit of:

> All local drivers employed by the company at its facility now located at 7526 South State Rd., Bedford Park, Illinois, but excluding all office clerical employees, guards and supervisors as defined in the Act and all other employees. In that same year Section 8(a)(1) and (5) charges were filed by the Union.

In 1989, the Board in *Overnite Transportation Co*., 296 NLRB 669, found that Respondent committed certain 8(a)(1)

violations which, ''established the context in which Respondent and the Union commenced negotiations.'' The Board held that these 8(a)(1) violations explained Respondent's motivation and conduct at the bargaining table. Furthermore, the Board found Respondent bargained in bad faith by refusing to agree to almost every major economic and noneconomic proposal set forth by the Union on the grounds that it did not plan or desire to depart from existing company policies. The Board further found that Respondent's mind was closed to the possibility of change, notwithstanding its self-serving assertions that it would listen to the Union's proposals and change its mind if ''convinced.'' The Board concluded, on the basis of all Respondent's conduct that it was bent on behaving as its managers had earlier threatened and that it was not constructively approaching the collective-bargaining process with an aim at reaching agreement with the Union.

On December 1, 1989, the Region dismissed a charge in which the Union alleged surface bargaining claiming Respondent engaged in dilatory, evasive, and otherwise unlawful actions. Appeals on January 24, 1990, upheld the dismissal citing the absence of unlawful conduct away from the bargaining table and Respondent's agreement with a 40-cent-per-hour wage increase and other provisions and proposals.

B. *Alleged 8(a)(1) Conduct*

General Counsel offered Darren Lawrence as a witness to the illegal conduct of Respondent. Lawrence was a city driver for Overnite for 5-1/2 years.

Lawrence testified that on October 12, 1989, he asked Terminal Manager Allen McBride when Overnite was going to give them a raise. McBride did not reply to the question but instead asked Lawrence his name. After giving his name, McBride said that he had heard of him. Lawrence asked what he had heard and McBride said nothing. No witnesses were present.

Lawrence testified that on October 30, 1989, in McBride's office at 5 p.m., with no witnesses present, McBride asked him what it would take to join the Overnite team. Lawrence, who took this to mean ''company man,'' responded that it would take better benefits, time and one-half, and more money. McBride then took a book from his desk and handed it to him. Lawrence described the book as a small hard cover handbook entitled, *Decertification of Unions*. McBride asked Lawrence to read the book but Lawrence gave it back to McBride saying he didn't want to. Next McBride handed Lawrence a letter signed by Howard Cochran and McBride which stated that if Overnite employees were to go on strike, they would be fired and replacements would be hired and they would keep their jobs as long as they liked. Lawrence told McBride he was not a union supporter. McBride asked Lawrence if he had a tape recorder on him and told him, he should let sleeping dogs lie and he shouldn't be coming into Overnite stinking stuff up after Overnite had been doing the same stuff for over 50 years.

After this conversation, Lawrence testified he met employees Earl Olson and Chet Pienkowski and they drove in Olson's car to Angie's Bar where he told them about the decertification book and the letter. They suggested he call Union Representative Sammy Tenuta which he did the next day.

Lawrence testified that in January 1990, he was called into McBride's office in the presence of Operations Manager Michael Knight and Driver Safety Supervisor Monty Flynn. According to Lawrence McBride stated that when Lawrence started work for Overnite in September 1984 he had signed a decertification petition. Lawrence said he was not there when the Union was voted in and questioned why Lawrence thought he was a union supporter. Lawrence stated that many times thereafter McBride told him he hoped Lawrence made it on the Overnite team.

Lawrence admitted that his work record in January 1990 was poor. During this period he was called into McBride's office and given written warnings for damaging freight. He had three or four writeups at this time but he told McBride that he thought the writeups for damaged freight stunk and he wanted some time off to look for a job before Overnite fired him. McBride offered to give him a good reference if he resigned rather than being fired. Lawrence had an on-the-job accident around this time and McBride told him his work record was poor and his personnel file was getting pretty thick. He asked Lawrence if he needed time off to straighten out his personal problems. Lawrence was discharged on March 16, 1990.

On cross-examination Lawrence testified that he only told Olson, Pienkowski, and Tenuta about the October 30, 1990 conversation with McBride. He further admitted that on his May 9, 1990 sworn affidavit to the Board agent, he did not take the book from McBride and that he did not see the title of the book or its author. He further admitted that his affidavit stated that there were no words on the cover. His explanation for the contradiction was that he was confused because he was under pressure from Overnite and his personal problems.

Chester Pienkowski testified that he is a driver for Overnite and in October 1989, Lawrence talked to him in Olson's 1987 or '86 Chevy Camero. Lawrence told him McBride offered him a book on decertification of unions and he gave it back saying he did not want to read it. Nothing more was said.

Sam Tenuta testified that some time between December 1989 and March 1990, Lawrence told him the terminal manager showed him some stuff about decertification of unions.

Terminal Manager Allen McBride testified that Lawrence would stop at his office once a week to engage in general conversation about drag racing, skiing, and his personal problems. Lawrence even invited McBride to his home for dinner, to drag races, and a skiing trip but he never accepted because he believed Lawrence was attempting to use him to gain favor. He stated that he never initiated any conversation about the Union with Lawrence. McBride testified that he never showed Lawrence a book on decertification and that he doesn't have such a book. He denied showing Lawrence a memo signed by Cochran and denied having such a memo. He denied ever showing Lawrence a petition for decertification and does not know whether Lawrence's name appeared on the petition. He further denied ever calling Lawrence into his office for such a purpose.

McBride did admit calling Lawrence into his office five times to discuss corrective action or writeups for poor performance. There was always someone else present. Lawrence told McBride that he was under tremendous pressure from home and work and may have to quit his job. He complained that he should be given special treatment, i.e., allowed time off and change of starting time because of his personal prob-

lems. McBride recommended that Lawrence resign but never offered to give him a good recommendation. Finally, McBride terminated Lawrence's employment for poor performance.

Analysis and Conclusions

I do not credit the uncorroborated testimony of Darren Lawrence for many reasons. It was obvious that the witness was biased against the Company, specifically McBride for having given him written warnings which he considered unjustified and for discharging him. Moreover, his testimony, regarding crucial elements of evidence was contradicted or omitted from his sworn affidavit. It should also be noted that the testimony of Pienkowski and Tenuta does not corroborate Lawrence's testimony because they were not present during the alleged October 30 conversation with McBride. In fact their testimony weakens Lawrence's credibility the same way that Lawrence's affidavit does. Neither witness mentioned a letter concerning strikes and, for that matter, never mentioned anything but the decertification book, omitting all of McBride's comments which Lawrence testified to. Even Pienkowski's testimony contradicts Lawrence's on the question of where he and Lawrence had their conversation.

McBride denies having the October 30 conversation with Lawrence and I credit his denial. Furthermore, I can find no evidence to support the alleged promise of benefits or coerced resignation allegation.

Accordingly, I recommend dismissing all the 8(a)(1) allegations.

C. *Alleged 8(a)(5) Conduct*

The facts concerning the negotiations were largely stipulated by the parties. The remaining evidence is contained in documents or was admitted. In short, there is no dispute over the facts the parties referred to in the stipulation and documents are as follows:

> John Pollard—Company Attorney, Sheldon Cherone—Union Attorney, Dan Ligurotis—Union Secretary Treasurer, Sam Tenuta—Union Business Agent.

The first meeting occurred November 21, 1989. Because of a dispute in the evidence presented at the unfair labor practice hearing regarding the Union's position, the Company asked if the Union wished negotiations to resume at the point where they had stopped or whether it wished to begin with a full contract proposal. The Union suggested the latter course and gave the Company its current Joint Area Cartage Agreement and stated that was the Union's proposal for a contract.

The Company asked if there were any significant changes in the new Cartage Agreement from the one proposed initially in 1982. The Union stated there were probably such changes but could not point to any specific ones without a careful study of the two documents. Therefore, the Company suggested that negotiations adjourn so that it could study the proposal. The Union suggested the parties adjourn and meet again the following week. This was agreed to.

The parties next met on November 29, 1989. Because of the intervening holidays, the Company had not been able to prepare and present its full contract proposal. However, there was considerable discussion of the impending federally required drug testing, average annual wages for truckdrivers, the Company's hospitalization and medical insurance plans, and the sick leave plan. The Union also advised that it was implementing a new health and welfare plan on December 1, 1989, and would send a copy of it to the Company.

The parties agreed to meet again on December 14, 1989, but this was postponed at the Company's request because of a conflicting court appearance by Overnite's counsel. The parties then met again on January 5, 1990. At the third meeting on January 5, 1990, the Company presented its counterproposal for a contract. Thus, as to the 29 articles contained in the Union's initial proposal, the Company expressed a willingness to agree (in whole or in part) to over half of them. With regard to those portions of the proposal the Company was opposed to, it explained its position as follows.

Article I, sections 1 and 2. The Company expressed its unwillingness to belong to any multiemployer bargaining units or to deal with any units other than Local 705, the Union certified as the employee's representative. Rather, the Company believed that the proper parties to the collective-bargaining agreement should be Local 705 and Overnite. The Union expressed no opposition to that position.

Article I, section 3. The Company stated that while it had no objection to giving notice of the existence of an agreement to any successors or purchasers, it did not believe it was proper to bind, in advance, any such entity to the agreement, because that might impede or prevent a sale of the Company. Instead the Company believed that any future relationship or obligations between Local 705 and a successor or purchaser should be worked out between those parties. The Union expressed no opposition.

Article II, section 1. The Company stated that it believed the proper ''recognition'' language should specify the Union, and bargaining unit certified by the Board, and not other union or employee units. The Union expressed no opposition.

The Company next stated that it was opposed to a ''union shop'' arrangement because it believed that employees should have the right to join and/or financially support a union (or to refrain from such action) as they saw fit, free from any threat of loss of employment, and felt the Company should remain strictly neutral in the eyes of its employees in that regard. That is, the Company believes it would be inappropriate for it to encourage or discourage any bargaining unit employee in his individual decision on whether to join or support the Union. And, the Company expressed concern that if it were to agree to a ''union shop'' provision, employees would perceive that as an expression by the Company of encouraging employees to join or support the Union. In short, being a party to an agreement, where under the Company would be obligated to discharge employees who failed to join or financially support the Union, would be wholly inconsistent with the Company's desired image of strict neutrality in such matters, at least in the eyes of the employees.

The Company expressed a similar concern about its participation in the so called ''check off'' of union dues and fees. That is, such participation in the process would signal to the employees, not neutrality, in such matters, but rather a notion that the Company favored the payment of such moneys. Overnite then stated its belief that the best way to be sure all employees clearly understood the Company's position of neutrality in this regard was to include in the con-

tract the language set forth in article II, section 1(b) of the Company's counterproposal.

The Company also stated another reason for its opposition to dues checkoff—mainly, that it was concerned such a provision would result in increased dissatisfaction with wages by employees and the corresponding demands for more money. The Company pointed out that employees tended to look not at the gross wages but, rather, their actual take-home pay in assessing the adequacy of their compensation. Consequently, any payroll deductions inherently caused dissatisfaction with pay and demands for more. In that respect, the Company viewed ''dues check off'' an economic matter.

The Union responded that the ''union shop'' and ''dues check off'' provisions were standard in all their contracts and that it felt very strongly that it should be included in the contract with Overnite.

The Union also questioned whether the Company made payroll deductions for other purposes and the Company replied that it made deductions only for taxes as required by law and for employee contributions to health insurance premiums which were required by the Company's insurance provisions. In short, where the Company had a choice, it did not make deductions for precisely the reasons it had just stated. The Company also made payroll deductions for uniforms where applicable.

Article I, section 4. The Company stated its belief that the agreement should pertain only to the Bedford Park employees. The Union took the position that any agreement reached should extend to the local drivers at the Company's Palatine, Illinois terminal as well.

Article II, section 2. The Company stated it was in agreement with the notion of a probationary period but believed a 90-day period was more appropriate in terms of truly assessing new employees' abilities and work habits. The Union expressed no opposition.

Article II, section 3(a). The Company stated it would agree not use casual employees, thus obviating the need for the Union's language concerning such use. The Union expressed no opposition.

Article III, sections 1, 2, 5, and 6. The Company pointed out that with the Union's concurrence, it had 3 months earlier instituted a 40-cent wage increase and believed this would be adequate for the duration of the 1-year contract Overnite proposed. This similarly obviated the need for a cost-of-living provision. The Union expressed no opposition.

The Company also stated that it was opposed to paying premium pay for overtime work, pointing out that such pay operated as a deterrent to work employees beyond 40 hours per week. That is, if the Company were required to pay a premium for overtime work, it would restrict employees to 40 hours per week. Without premium pay employees would expect to work approximately 50 hours per week thus increasing their total earnings. The Union's position was that it had premium pay in all its contracts and this was very important to it.

Article III, sections 3 and 4. The Company stated that no bargaining unit employees were scheduled to commence work during the stated hours and only rarely did such employees work over into that time period. Therefore, the Company did not believe a ''night shift or after midnight'' premium provision was applicable to its operation. The Union was still asking for a 20-cent night differential.

Article III, section 8(b). The Company pointed out that because all paychecks were cut at the home office in Richmond, it would be impossible to pay discharged employees on the next day. The Union expressed no opposition.

Article III, section 12. The Company noted that while the Company's existing funeral leave plan provided for only 2 days of paid leave, it afforded leave in the event of death of more persons (10 versus 6) than the Union's proposed plan. Therefore, the Company proposed to continue its present plan and the Union agreed.

Article IV. The Company pointed out that because of the nature of its operation, and the need to vary work schedules to fit customers' needs, it was opposed to the establishment of rigid work hours, shifts, and meal periods. The Union wanted a fixed work schedule for purposes of determining premium pay for overtime.

Article V, sections 1, 2, 3, 4, and 4(a). The Company stated that since its customers did not guarantee the availability of freight, it was opposed to extending guarantees of work to its employees. The Union still wanted its guarantees.

Articles VI and VII. The Company expressed its belief that its existing holiday and vacation packages were adequate to attract and keep employees, consequently, saw no need to improve them at the present time. The Union expressed no opposition.

Article VIII, sections 1, 3, and 4. The Company pointed out that under its existing seniority procedures, laid-off employees could return to work without loss of seniority if they were recalled within a period of time equal to their length of service as opposed to the fixed 3-year period in the Union's proposal. Moreover, under that system, bargaining unit employees could bump employees from nonbargaining unit positions if they had sufficient seniority. Thus, the Company's existing seniority provisions were superior to those proposed by the Union. *The Union acknowledged that recall rights under the Company's plan were superior but stated it did not want bargaining unit employees to bump—or be bumped by—nonunit employees. The Union did not acknowledge that the recall rights under the company plan were superior to those contained in the Union's proposal.*

Article II, section 2, sentence 2. The Company stated it believed it unwise to agree to hold the Union harmless for a breach of contract simply because that might occur through the action of a steward. The Union expressed no opposition.

Article XII. The Company stated it would agree not to use owner-operators for the duration of the contract thus obviating the need for article XII. The Union expressed no opposition.

Article XIII. The Company stated that while it was willing to agree that it would not subcontract work to evade its obligations under the contract, it felt it needed the flexibility to subcontract work whenever that proved economically desirable and not only in the limited circumstances set out in the Union's proposal. The Union expressed opposition to subcontracting.

Article XV. The Company stated its belief that there should be a commitment by the Company and the Union not to lock out or strike during the term of the contract. Further, the Company stated, it viewed the Union's article XV as a ''loophole'' to the ''no strike'' provision and, therefore, was opposed to it. The Union expressed no opposition.

Article XVI. The Company pointed out that under the Union's proposed plan employees could leave Overnite and go to work for other signatory companies without risking loss of insurance benefits, conversely Overnite employees who might be covered by the Union's plan could not transfer to other terminals (or other jobs at the Bedford Park terminal) without some loss of benefit. Thus, the Company viewed having one health and welfare plan for its Chicago local drivers and another plan for all other Overnite employees is very impractical.

More importantly, however, since Overnite presently shares the premium cost with its employees, and under the Union's plan the Company would be obligated to pay the entire premium, that would be a major cost item to the Company. The Union responded that it would insist on the Company's agreement in its health and welfare plan.

Article XVII. Similarly, to the Company's position on the Union's health and welfare plan, it expressed opposition to having one pension plan for Chicago drivers and another for all other Overnite employees. The Union stated its pension plan was very important.

Article XVIII. The Company expressed its agreement that the Union should have access to company premises but believed it was reasonable that it receive 24 hours' advance notice and that such access should not interfere with its operations. Further, the Company believed that the employees should not be discriminated against because they chose to refrain from union membership or activities. The Union expressed no opposition.

Article XIX. The Company expressed its concern that under the Union's proposal for all unsettled grievances to culminate in binding arbitration, the Company could be the recipient of a devastating, adverse arbitration award. Recognizing, on the other hand, how important arbitration was to the Union, the Company proposed that some grievances—those not involving discipline, safety, or claims in excess of $1000—could be arbitrated at the request of either party. All other grievances would be subject to arbitration only by the agreement of the parties on a case-by-case basis. The Union stated that it would insist on final and binding arbitration of all grievances.

Article XXII. The Company stated that it occasionally found it necessary to utilize city drivers as dockworkers or on over-the-road runs and this greatly enhanced the efficiency of its operations. Consequently, it was opposed to the limitation on such utilization set forth in article XXII of the Union's proposal. The Union was opposed to the use of local drivers to do other than driving work.

Article XXIII, section 1. The Company stated it was opposed to a ''maintenance of standards'' clause and preferred a so-called ''zipper clause'' because of the certainty provided by the latter language in determining what its contract obligations would be once a complete agreement was reached. The Union was opposed to the proposed ''zipper clause.''

Article XXIII, sections 12 and 13. The Company pointed out that its existing sick leave and jury duty plans were far superior to those proposed by the Union. The Union, therefore, agreed to the Company's proposals in that regard.

Article XXIII, section 14. The Company pointed out that it didn't plan to institute a profit sharing plan thus obviating the need for such language. The Union expressed no opposition.

Article XXIII, section 15. The Company stated that it believed there should be other conduct than that listed in the Union's proposal that would warrant discharge and proposed that employees be discharged only for legal cause. The Union expressed no opposition.

Article XXIV. The Company expressed a willingness to agree that it would not move its terminal for the purpose of evading the contract and the Union expressed no opposition.

Article XXIX. The Company expressed its view that because of the current uncertainties in the trucking industry and in the economy as a whole, a more appropriate contract term would be 1 year. The Union expressed no opposition.

At this point, the Union suggested that the parties adjourn and meet again at a time when Ligurotis could be present. The Union also suggested that the parties next schedule 2 consecutive days to meet. The earliest such 2-day period mutually convenient to the parties was January 30 and 31, and agreement was reached to meet at that time.

On January 30, after considerable discussion of union security, dues checkoff, health and welfare, and premium pay for overtime, the Union stated it would give up its demands on all other articles if the Company would agree to the following:

1. The Union's health and welfare plan.
2. Premium pay for overtime after 40 hours per week.
3. Dues check off.
4. A contract expiration date of March 31, 1991.
5. A wage re-opener in six months.
6. The Union's seniority language with regard to layoffs and recalls (the Union was willing to accept the Company's provisions regarding the length of time an employee was entitled to recall without loss of seniority, but objected to employees bumping into and out of the bargaining unit), and
7. Mandatory arbitration of all grievances.

The parties agreed to caucus overnight and meet again the next day.

On January 31, the Company made the following counterproposals:

1. The company still believed that its current health and welfare plan was more advantageous to it and was opposed to paying the additional cost of the total premium for the Union's plan.
2. The company would agree to pay premium pay for all hours worked after 52 per week.
3. The company was still opposed to dues check off but was willing to allow Union representatives access to company property on payday for the purpose of collecting dues, and provide funds with which to cash employee checks.
4. The company would agree to a wage reopener but counterproposed that it be in nine months instead of six.
5. The company would agree to a longer than one year contract but wanted it to expire on March 1, 1991 so that bargaining for a new contract would occur at a time prior to the Union negotiations for a new national contract.

6. The company would agree to the Union's seniority proposal, and

7. While the company was still opposed to arbitration of all grievances (at the request of either party), it stated it would be willing to modify its earlier proposal to provide that more grievances could go to arbitration either by raising the monetary limits of liability or by exploring whether some categories of discipline or safety grievances might be susceptible to arbitration without the prior consent of the company.

Counsel for the Charging Party does not believe the Company offered to explore whether some categories of discipline or safety grievances could go to arbitration without the prior consent of the Company.

The Union caucused and came back with the following counterproposal:

1. Insistence on the Union's health and welfare plan, dues check off, and arbitration of all grievances.

2. Agreement on the company's counterproposal for a contract expiration date and a wage reopener after nine months.

3. Premium pay for overtime after 45 hours.

The Company caucused and then took the following position:

1. It was still opposed to the Union's health and welfare plan, dues check off and arbitration of *all* grievances. However the company again expressed its willingness to provide facilities and procedures on company property to make it easier for the Union to collect its dues. The company also reminded the Union of its offer to modify its arbitration proposal.

2. The company would agree to pay premium pay after 50 hours of work.

Because Ligurotis was not present at either of these two meetings, the Union requested an adjournment to consult with him. The parties next agreed to meet on March 26, 1990.

At this meeting the Union advised that its position remained unchanged as to health and welfare and arbitration. However, as to premium pay for overtime, the Union indicated a willingness to compromise somewhere between 45 and 50 hours. The Union also expressed a willingness to give up dues checkoff if the Company would agree to the union-shop provisions in its proposal.

The Union also stated that the benefit level of its health and welfare plan was far superior to that of Overnite and was cheaper—$62 per week as opposed to $66 per week. The Company expressed doubt about that but agreed to make a detailed benefit comparison of the two plans before the next meeting. The parties agreed to meet again on April 18.

On that date, the parties met and the Company pointed out that the Union's health and welfare plan was inferior to the Company's in terms of the amounts paid for the following services:

In patient medical, maternity, surgical and mental—physician and other charges, out-patient surgery—Facility, physician, radiologist, anesthesiologist, and other charges; out-patient mental; home health care; when plan pays 100% for medical expenses; maximum lifetime benefits; and injury caused by operating motorcycle, sky diving or similar activity.

Moreover, the plans were equal as to preadmission tests, lab and X-ray, outpatient emergency and accident, physician visits, hospice care, prescription drugs, and other expenses. Only as to the deductible amount and the provision for legal services was the Union's plan better than that of the Company. This, the Company pointed out, was a further reason it was opposed to changing to the Union's plan.

Finally, the Company stated its position with regard to overtime, dues checkoff, union shop and arbitration remained unchanged from that expressed to the Union in the previous meetings.

The Union agreed to consider this and the parties met again on March 26 and April 18, 1990, at which time their positions remained largely unchanged except that the Union expressed some willingness to compromise on the overtime premium pay question.

On July 24, the Union stated it had a new proposal as follows:

1. Instead of a wage reopener, an immediate increase of $1 per hour.

2. A weekly guarantee of 40 hours per week to the first 90% of drivers put to work in any given week.

3. A four hour guarantee to drivers who reported to work on Saturday and found no work available.

4. An eight hour guarantee to any driver reporting to work on Sunday.

5. Either the Union's health and welfare plan, or a significant reduction in the portion of the premium paid for Overnite's plan.

In addition, the Union asked that the Company reconsider its positions on dues checkoff, union security, and arbitration.

Following a caucus, the Company indicated it believed there were portions of the Union's proposal to which it could agree but requested some time in which to determine the wages being paid to drivers in the Chicago area by smaller trucking companies. This was agreed to but prior to adjournment, the parties discussed two other matters.

First, as to arbitration of grievances, the Union asked if the Company might agree to the appointment of a permanent arbitrator to hear all grievances. The Company again pointed out that while it might be willing to agree to arbitration of some—or many—grievances, it was unwilling to give blanket agreement, in advance, that every grievance would go to arbitration if the Union so chose.

The Union next suggested that the Company agree that all discipline and discharge grievances involving employees with more than 1 year of service be arbitrated. The Company pointed out that it was more concerned with the conduct of discharged employees than their length of service. And, in that connection, the Company stated that it would be willing to compromise its previous position on arbitration to automatically include employees who had been terminated for poor work performance as opposed to those who had been discharged for misconduct. Counsel for the Charging Party does not believe the Company offered to permit arbitration of grievances involving employees terminated for poor performance as opposed to those discharged for misconduct.

The Union next asked if the Company would allow Business Agent Sam Tenuta to come into the terminal premises one or two mornings a month and have meetings with the drivers before they departed on their runs. The Company agreed to consider this and the meeting adjourned.

The parties next met on September 6, 1990. At this meeting, the Company responded to the Union's proposal as follows:

> 1. The company counterproposed a 40 cent immediate increase with no wage reopener during the term of the contract.
> 2. The company was opposed to reducing the employee share of health and welfare contributions but was working on keeping premium increases down.
> 3. The company would agree to the Union proposal for a four hour guarantee [reporting pay] for Saturday and counterproposed a four hour guarantee for Sunday work, provided the drivers were willing to perform whatever work might be available.
> 4. Because of the uncertain economy and rising fuel costs, the company was opposed to a guarantee of 40 hours per week to any driver.
> 5. The company did not have a proper facility to permit meetings with the drivers and was, therefore, opposed to the Union's proposal in that regard. The company pointed out that the only space for such meetings would be either in the drivers room or in the canteen, both of which are shared by other, unrepresented employees and, therefore, unsuitable to the types of meetings envisioned by Tenuta. The company also pointed out that it ordinarily rented off-premises rooms for its own meetings with employees.

The Union then asked where the Company intended to allow Tenuta to collect union dues under its proposal. The Company pointed out that it had proposed to put a table near the timeclock but that would not be a suitable place for union meetings. Finally, the Company reiterated that it had never sought to keep Tenuta off its property provided it had advance notice of his visits and that they did not disrupt the Company's business.

The Union then asked if the Company would agree to afford it a bulletin board on company property for posting notices of meetings and other ''official union business.'' The Company expressed its willingness to provide such bulletin board but reserved the right to monitor the contents of all postings to ensure that they did not degrade the Company or contain inflammatory propaganda. The Union assured the Company it had no such intentions. While the parties did agree that the bulletin board would not contain materials that degraded the Company or contained inflammatory propaganda, the Union did not agree that the Company could monitor the contents of all postings.

At that point, the Union stated it appeared the parties were getting close to a full agreement but stated it still would insist on some movement from the Company on dues checkoff and arbitration. The Company reminded the Union that it already had expressed a willingness to compromise further on arbitration and would carefully consider any new proposals the Union wished to make on dues checkoff. The Union then caucused.

On returning, the Union made the following proposal:

> 1. Daily overtime premium pay after nine hours.
> 2. Weekly overtime premium pay after 45 hours.
> 3. 50 cents immediate wage increase.
> 4. 20 cents night differential pay.
> 5. Nine paid holidays—the day after Thanksgiving plus one to be determined.
> 6. A freeze at present levels of the employees share of health and welfare premiums and
> 7. A contract expiration date of March 31, 1991.

The Union then stated that if the Company would agree to these seven items it would agree to all the other company proposals including those concerning dues checkoff and arbitration. The Company asked for time to compute the cost of this proposal and the parties agreed to adjourn until September 19, 1990.

On that date, the Company responded to the Union's proposals as follows:

> 1. The Company still felt that it should offer premium pay only after 50 hours per week.
> 2. The company would agree to a 50 cent immediate wage increase.
> 3. The company was still opposed to night differential pay because only one or two drivers ever worked during that period—and then irregularly—and the company was concerned that such a differential would cause morale problems among those employees who worked just as many hours, but at different times.
> 4. The company felt that its current seven day holiday package was adequate.
> 5. The company would agree to a contract expiration date of March 31, 1991 and
> 6. The company would agree to freeze the employees health and welfare levels but counterproposed that such a freeze only extend to the Union's proposed contract expiration date.

The Union then announced that it was withdrawing the proposal of September 6 in its entirety and was reverting to its original contract proposal of November 21, 1989, except that it proposed a new contract expiration date of April 1, 1994, with wage reopeners of April 1, 1991, April 1, 1992, and April 1, 1993. The Union also proposed an 18-month freeze on health and welfare contributions by employees plus a reopener on such contributions at that time. The parties then adjourned indefinitely pending trial of this case.

Regarding the Union's allegation that the Company agreed to a 50-cent increase for its represented drivers but implemented a 60-cent increase for its unrepresented drivers, that simply is not so.

By way of background, around September or October of each year for the last several years, the Company has given a general wage increase. In each case, the Company has proposed that such increases be implemented immediately for the Chicago drivers (currently, the only Union-represented employees in Overnite's system) without prejudice to the Union in negotiating for a better increase when the parties agree on a full contract. While the parties have been bargaining about a collective-bargaining contract over the years, the Company has from time to time proposed to the Union companywide annual wage increases for the local drivers with the understanding that agreement by the Union to the imple-

mentation of these increases would not in any way prejudice the Union's right to demand still further increases in the ongoing contract negotiations, nor would such agreement preclude the Company from giving full consideration to such demands.

In the meeting of September 6, 1990, when the Company offered an immediate 40-cent increase, the Union asked if the Company was planning on implementing such an increase systemwide. Company negotiators responded that a decision on whether to give a general increase and, if so, how much or when, had not been made by Overnite's top management.

Then, on September 19 when the Company agreed to the Union's proposal to an immediate 50-cent increase, the Union raised the same question and was again informed that no decision had been made.

Such a decision was made—60 cents effective October 1, 1990—on September 22, 1990. That fact was communicated by telephone to Cherone when the Company proposed implementation of a 60-cent increase for the Chicago drivers on October 1 as well, without prejudice to further bargaining on the subject. Cherone immediately agreed and that was accomplished.

Thereafter, on September 28, 1990, the Company received from the Union a telefaxed document reporting to be a ''summary of bargaining with Overnite'' along with a request that the Company post it on the bulletin board the Company had agreed to provide for the Union.

John Pollard testified that in January 1990 he offered to modify his arbitration proposal either by raising the monetary limit or exploring with them (Union) some way that more cases than what they had provided for could go to arbitration. The Union wanted all cases to go to arbitration. On September 6, the Union demanded that all discharge cases should automatically go to arbitration. Pollard countered by saying that he would be willing to raise the liability level in allowing arbitration on some discharge cases. Cherone offered to limit arbitration on discharge cases to employees with over a year service and to forego arbitration on theft cases. Pollard stated that there were other offenses as serious as theft and he didn't see any other way but to list all of them. Pollard then offered to arbitrate discharge cases involving poor work performance. The Union was not receptive to this proposal. On September 6, the Union proposed that all grievances be arbitrated except theft and those cases involving employees with less than a year's service. Finally the Union abandoned arbitration if the Company accepted its package outlined in the stipulation of events on September 6.

With respect to the bulletin board issue the Union sent a *Summary of Bargaining with Overnite* to the Company for posting on September 28, 1990. In the summary the Union stated in part:

> After many meetings with Overnite, the only changes in the Company's position are:
>
> 1. An offer of a sixty cent (60) increase.
> 2. Overtime after fifty (50) hours and
> 3. Freeze employees contributions to the health plan until March 31, 1991.
>
> We told the Company that we wanted more. A one dollar ($1) per hour increase, but we would take the sixty cents (60 cents) increase, which is effective October 1, 1990 and continued to bargain for more money.

The Company in a letter to the Union dated October 2, 1990, refused to post the summary stating in part:

> We have received the attached *Summary of Bargaining with Overnite* which Mr. Ligurotis sent by telefax to Mr. Knight to be posted on the Chicago terminal bulletin board. Since the notice contains numerous inaccuracies and was totally misleading in many other respects, it is not suitable for posting under the standards agreed to by the Company and the Union at the bargaining table.
>
> For example, as you well know, in the many meetings between the Company and the Union, Overnite has changed its position in an effort to reach agreement many more times than the three enumerated in the first paragraph of the notice. Similarly, in the second paragraph, the fact that the Union makes no mention of its counterproposal for a fifty cent wage increase makes that paragraph grossly misleading. There are many other such examples.
>
> If the Union wishes to prepare a full and accurate summary of the various proposals, counterproposals, positions taken, and reasons given therefore by both the Company and the Union during the collective bargaining that has taken place between them, we will be happy to post such a document.

On February 18, 1991, the Union sent the Company a *Report on Negotiations* for posting on the company bulletin board. The report stated in pertinent part:

> We had our last meeting on September 6, 1990 with the Company insisting on keeping all of its present terms, working conditions and their own health and welfare and pension plans. The Company's offer of a 40 cent per hour increase we rejected. Our demands for daily overtime after nine hours, weekly overtime after 45 hours, 50 cents per hour wage increases, 20 cents night differential, nine holidays instead of 7, freeze of health and welfare contributions for 18 months, as well as an agreed list of arbitrators, with the contract expiring March 31, 1991 were all rejected.
>
> In respect to arbitration, the Company insisted on the right to reject any arbitration with Local 705 having the right to strike and the Company the right to permanently replace any strikers. We rejected this proposal.
>
> The NLRB has petitioned the Court of Appeals for the 7th Circuit to enforce the Board's order and to order Overnite to cease its unfair labor practices and bargain in good faith with Local 705. The Company is seeking to set aside the Order. We shall keep you informed when the court decides this case. If the court enforces the Board's order, Overnite will have to bargain in good faith and can not continue to insist on keeping all of its conditions, wages and working rules by rejecting all of the employees' demands.

The Company in a letter to the Union dated March 1, 1991, refused to post this notice stating a pertinent part:

> We have received your letter of February 18, 1991, requesting that we post a notice for Local 705 at Overnite's Chicago terminal. We certainly are willing to do so; however, we know there are several inaccuracies in the notice that are objectionable.
>
> First Overnite has not insisted on keeping all of its present terms and working conditions, as you know, we have offered several concessions that differ from those presently in existence.
>
> Second, the Company did not reject the Union's demand for a 60 cent per hour wage increase but agreed to it.
>
> Third, and similarly, the Company did agree to a contract expiration date of March 31, 1991 and agreed to freeze health and welfare contribution until that time.
>
> Reasonable people could disagree with your statement about the the consequences of a Court of Appeals decision favorable to the Union so, we believe the notice should plainly indicate that the statement made in the last sentence of the fourth paragraph is your opinion, not a fact.

Analysis and Conclusions

General Counsel alleges that Respondent reneged on its agreement to permit the Union to post notices on its bulletin board. The stipulated facts refute this allegation. The Respondent agreed to provide a bulletin board but reserved the right to monitor the contents of all postings to ensure that they did not degrade the Company or contain inflammatory propaganda. The Union did not agree with this company proposal, objecting to the monitoring.

It appears from the above stipulated facts that Respondent never reneged on any agreement because there was no agreement. Consistent with its position, Respondent agreed to post the Union's notices if it corrected certain inaccuracies which were set forth in Respondent's letters to the Union.

Based on the above evidence, I find that Respondent did not violate Section 8(a)(5) of the Act by reneging on its agreement.

The 8(a)(5) allegations in the complaint, paragraph VII (1–4) with the exception of the bulletin board allegation are fatal on their face because they do not allege a violation of the Act. It is one thing to use lack of agreement with union proposals in assessing totality of conduct, but quite another to allege failure to agree as a violation of the Act. Section 8(b) of the National Labor Relations Act clearly states that such obligation (to bargain in good faith) does not compel either party to agree to a proposal or require the making of a concession. This section has been applied by the Board in many cases, *Atlanta Hilton & Towers*, 273 NLRB 87 (1984), and has been recognized and upheld by the Supreme Court. *NLRB v. Reed & Prince Mfg. Co*., 205 F.2d 131 (1st Cir. 1953), cert. denied 346 U.S. 887 (1954); *NLRB v. American National Insurance Co*., 342 U.S. 395 (1952). It seems obvious that if merit to allegations—paragraph VII (1–4) were found, it would require ordering Respondent to agree to the Union's proposals. This was clearly not the intent of Section 8(d).

The complaint allegations are very specific and relate to only four areas where the Company refused to agree to the Union's proposals: dues checkoff, union security, health and welfare, and binding arbitration. No other indicia of bad-faith bargaining is alleged unless one considers, ''overall acts and conduct.''

In reviewing all the evidence including the stipulated facts and the unrefuted testimony, it becomes apparent that the Respondent did not bargain in bad faith. The record indicates that Respondent met with the Union. It accepted many of the Union's initial proposals and where it rejected proposals; it gave explanations.

Respondent made concessions, retreating from its earlier position. For example, it conceded on a wage increase, reached agreement on a wage reopener in 9 months, changed its position on nonpayment of overtime, and agreed to assist the Union in the collection of union dues and offered a limited form of grievance arbitration.

In April, the Respondent insisted on retaining its health and welfare plan over that of the Union's with a detailed explanation as to why its plan was better. The Union eventually abandoned its proposed health and welfare plan. Respondent further agreed to pay premium pay after 50 hours.

In September, the Union indicated that the parties were close to agreement but needed some movement from the Company. It proposed seven items and indicated that if the Company agreed to those seven items, it would agree to all other company proposals including arbitration and dues checkoff. The Company countered with an offer of: (1) premium pay after 50 hours per week, (2) immediate wage increase of 50 cents per hour, (3) no night differential, (4) same holiday package, (5) contract expiration date of March 31, 1991, and (6) freeze in present levels of employment contributions to health and welfare.

At this point in time, the parties were in total agreement on three items. Five hours apart on weekly overtime and 2 days apart on holidays. They were in disagreement on daily overtime and night differential.

After these negotiations, the Union withdrew its September offer and offered its original contract proposal of November 21, 1989, with some exceptions.

Notwithstanding the Board's decision in a prior case, I cannot find sufficient evidence of bad-faith bargaining to support the complaint allegations. Accordingly, they are dismissed. *Eltec Corp*., 286 NLRB 890 (1987).

Based on the above findings and conclusions, I recommend dismissing the complaint in its entirety.

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The following unit constitutes a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

> All local drivers employed by the Respondent at its facility located at 7526 Southstate Road, Bedford Park, Illinois, but excluding all office clerical employees, guards and supervisors as defined in the Act, and all other employees.

4. Respondent has not engaged in any violations of Section 8(a)(1) and (5) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[1]

ORDER

The complaint is dismissed.

[1] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.